IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 17283 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.M.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SAMIXA CHHANABHAI PATEL

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 17283 of 2003

MR YN OZA, LD.SR.ADVOCATE WITH MR BP GUPTA

.... for Petitioner No. 1

MS MITA PANCHAL, LD.AGP for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE K.M.MEHTA

Date of decision: 05/05/2004

C.A.V. JUDGEMENT

1. Rule. Ms.Mita Panchal, learned AGP waives

service of rule on behalf of respondents.

2. Samixa Chanabhai Patel has filed the present petition with the prayer for a direction to the respondents to fill up 15% seats in PTC course in all Government, Government aided and self-financed college during the admission programme of the 3rd stage for PTC course of the year 2003-2004. The petitioner has also prayed to direct the respondents to reserve 15% seats for S.T. candidates in Management Quota of Self-financed PTC college and further to direct the respondents to give admission to the petitioner on the abovesaid seats.

3. The respondents issued an advertisement for Primary Teachers Certificate Course ("PTC course for short") somewhere on 30-6-2003. Pursuant to the said advertisement, the petitioner has made an application for admission to PTC Course on 6-7-2003. It is also stated by the petitioner that 7% seats are reserved for Scheduled Caste category candidates, 15% seats are reserved for Scheduled Tribe category candidates and 27% seats are reserved for Socially and Economically Backward Classes category candidates. The aforesaid reservation is made for admission to all Government, Government-aided and self-financed colleges run within the Gujarat State. The respondents have published the list of the candidates belonging to the Scheduled Tribe category including the women and there were 521 students and the petitioner's name stands at Sr. No.443 in the said list. It is further stated by the petitioner that there are about 8500 seats to be filled in for PTC course and for the said purpose, the Director of Primary Education respondent no. 2 has issued Admission Programme for PTC course for the year 2003-2004. The women candidates who have secured 78.17% marks from General Stream have been called for interview because they are eligible for admission whereas the women candidates belonging to ST category having 76.67% marks or more than that are entitled for admission and they were called for interview. The respondent no. 2 has also issued 2nd stage admission programme wherein it has been stated that women candidates belonging to General Category Stream and who have passed Higher Secondary Certificate Examination in General Stream and having 77.50 marks or more than that, they will be admitted and they have been called for interview. Where the women candidates belonging to Scheduled Tribe category who have passed Higher Secondary Certificate Examination in General Stream and have obtained 76.67% marks or more than that they will be entitled to admission. The respondents have also 3rd stage programme for admission to the PTC course. In the

said third stage programme, there is no separate mention for women candidates who have passed the Higher Secondary Certificate Examination from General Stream belonging to the Scheduled Tribe category but they will have to complete with the candidates belonging to General category and for that 76.83 or more than that marks are required.

4. In view of the aforesaid facts and circumstances of the case, petitioner submitted that it is incumbent upon the respondents to maintain 15% of reservation in seats to Scheduled Tribe candidates. It is further incumbent upon the respondents to issue a fresh programme for admission to 3rd stage by stating separate percentage of marks for Scheduled Tribe candidates so that no injustice is done to the petitioner and similarly situated persons. After hearing the learned advocate for the petitioner, this Court has issued notice and directed the Government to file an affidavit-in-reply on or before 15-12-2003.

4.1 Pursuant to the notice dated 15-12-2003 issued by this Court, the affidavit-in-reply has been filed on behalf of the respondent no.2 Thereafter, the petitioner has filed rejoinder affidavit on 22-1-2004. Thereafter, the matter was heard at length looking to the importance of the matter.

5. Learned Senior Counsel Mr.Yatin Oza has submitted that comparative statement of all the three admission programmes of PTC course would clearly show that the seats which are required to be filled in from Scheduled Tribe candidates have been given go-bye in the admission programme of 3rd stage as no separate category has been shown for women candidates belonging to Scheduled Tribe category. It is pertinent to note that 74.67% was the cut off marks for scheduled tribe category for women candidates in the 2nd stage programme of admission. Whereas in the third stage, the marks required are 76.83% or more, meaning thereby, no student from Scheduled Caste category who is left out from admission will be entitled to get admission in the third stage programme of admission to PTC course. It is submitted that it implies that the total number of seats which are to be filled in the third stage admission programme will be filled in from general category only and there will not be any reservation for any Scheduled Tribe candidates. It is submitted that it will be an indirect elimination of reservation from admission to PTC course from Scheduled Tribe candidates which is totally unconstitutional, illegal, arbitrary and therefore the impugned action of

the respondent deserves to be quashed and set aside by this Court.

6. The learned Senior advocate further contended that the PTC admission programme for the year 2003-2004 has been made by the respondents for all the colleges including self-financed colleges and the interviews for the admission of third stage will be the last programme for admission and if the petitioner is not given protection then irreparable loss will be caused to the petitioner. It is submitted that the petitioner has secured 74.33% marks and the petitioner was waiting for her chance for admission as in the second stage programme of admission, the cut off marks for scheduled tribe category for women candidates from general stream was 74.65% but now due to the alleged illegality committed by the respondents by mentioned 76.83% marks as cut off marks for women candidates, the petitioner will not get any chance for admission and therefore the respondents are required to be directed to issue new programme for PTC course examination in the third stage mentioning the percentage of marks for each category separately and the petitioner may be called for interview and may be given admission.

7. The learned Senior Advocate further contended it is incumbent upon the respondents to maintain 15% of reservation in seats to Scheduled Tribe candidates and for that purpose it is also incumbent upon the respondents to issue a new programme for admission of third stage by mentioning separate percentage of marks for scheduled tribe candidates so that no injustice is caused to the petitioner and similarly situated persons.

8. Mr. Yatin Oza, Learned Sr. Advocate with MR.B.P.Gupta, learned advocate for the petitioner has invited my attention to Article 15 of the Constitution of India which provides as under :

"15 - Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth :

(1) The State shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them.

(2) .....

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes"

9. The learned Senior Counsel has further submitted that the action of the respondents is against the constitutional mandate enshrined under Article 15 of the Constitution of India. It is also submitted by him that imparting education is a sovereign function and the State while discharging the same is required to be adhere to the constitutional provisions. The Government by not providing for the reservation for scheduled tribe category to the tune of 15% in management quota in S.P.C. is therefore bad and illegal and therefore the respondents are required to keep 15% seats reserved for scheduled tribe candidates in management quota seats and to give admission to the petitioner on the said seat.

10. Ms. Mita Panchal, learned A.G.P. appears on behalf of the respondents. She has relied on the affidavit-in-reply filed by one V.B. Nanavati, Dy. Director, Primary Education, on 15-12-2003. In the said affidavit-in-reply Gujarat Educational Institutions (Pre-Primary and Primary Teacher Training Colleges) Rules, 1984 are quoted, the relevant portion reads as under :

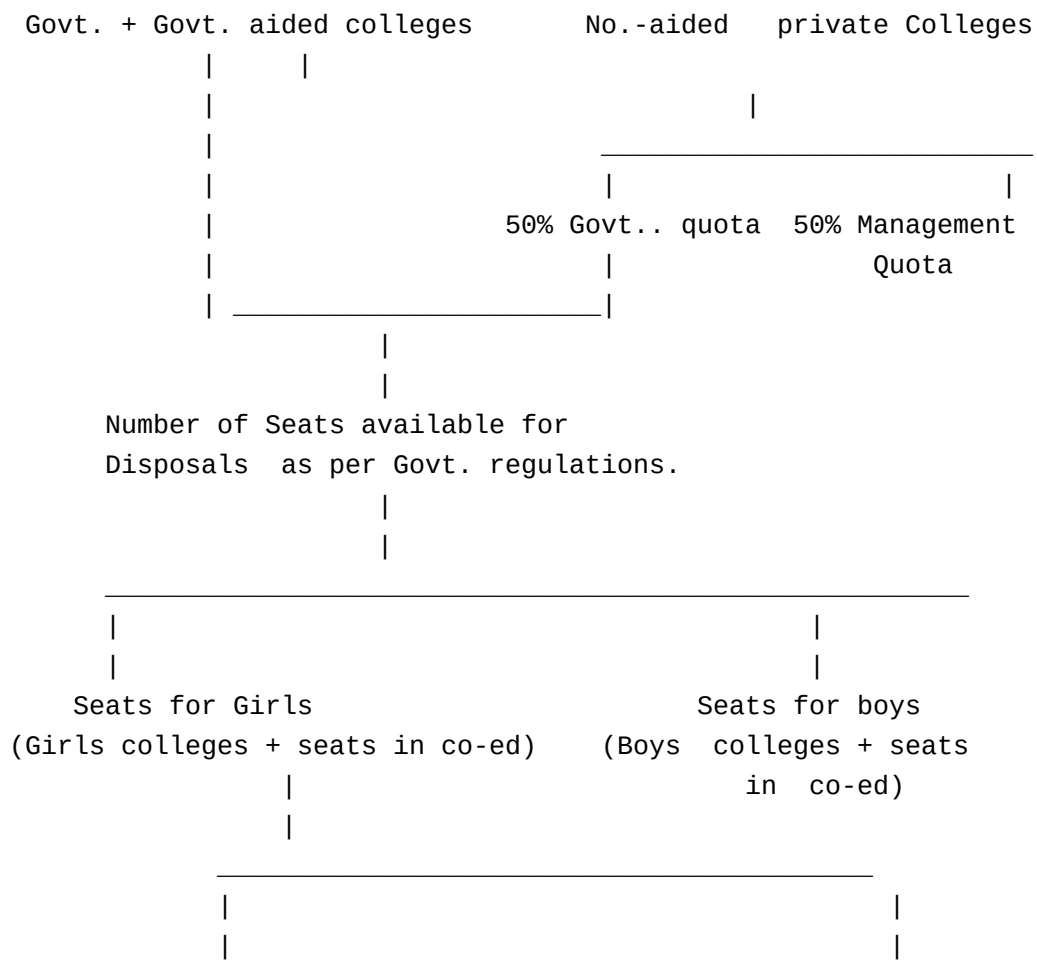
"The minimum qualification ___ in case of Primary Teachers Training:

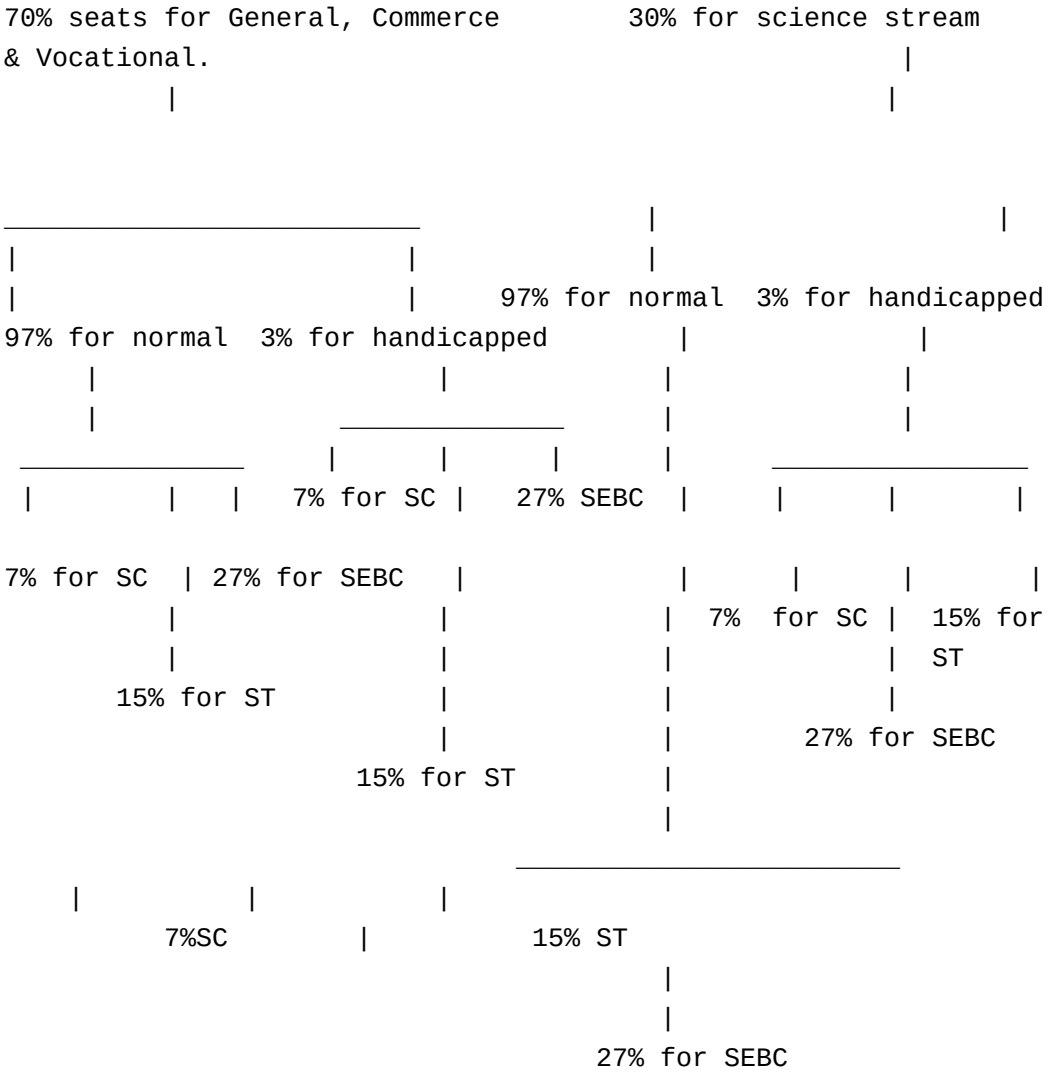
Provided that in case of Primary Teachers Training Course, out of total seats 70% seats shall be allotted to candidates from General, Commerce, Vocational and Uttar Buniyadi Stream, 30% of seats shall be allotted to candidates from Science stream in ratio proportionate to successful candidates in respective stream in Higher Secondary School."

10.1 It is further stated in the said affidavit-in-reply filed on behalf of the respondents that 70% seats are allotted to candidates from General, Commerce, Vocational and Uttar Buniyadi Stream, and 30% seats are allotted to candidates from Science Stream proportionately based on the number of students passing in the said streams. Thereafter, as per regulations

number of seats for scheduled tribe, scheduled caste and socially and economically backward class is calculated i.e. 7% for Scheduled Caste, 15% Scheduled Tribe and 27% for SEBC. The procedure followed for different categories is shown in the flow chart, which is as under:

CHART SHOWING THE ALLOTMENT OF SEATS IN PTC COURSE.


Govt. + Govt. aided colleges
No.-aided private Colleges
50% Govt.. quota
50% Management Quota
Number of Seats available for Disposals as per Govt. regulations.
Seats for Girls (Girls colleges + seats in co-ed)
Seats for boys (Boys colleges + seats in co-ed)



10.2 On relying upon the aforesaid chart, learned A.G.P. After showing to this Court the aforesaid chart, learned A.G.P. submitted that total number of seats available for female candidates for all the streams and its categorization, total seats are 4432 = 12 for Dang region + 1325 Management quota SFI + 3095 Govt. quota in SFI & Govt. colleges & Govt. aided colleges. The schedule and the table showing the seat no. is as under:-

Total seats	Normal			Handicapped				
Open	SC	ST	Baxi panch	Open	SC	ST	Baxi panch	
Science Stream	910	450	62	132	238	17	1	3	7
General Stream	2113	1058	141	305	545	35	4	8	17

Uttar Buniyadi	29	15	2	4	7	1	-	-	-
Voca-tional Stream	43	21	3	6	11	2	-	-	-

10.3 After referring to the aforesaid chart/schedule ld.A.G.P. submitted that in science stream as the required number of candidates were not available in the ST category, 61 seats of the said category are converted into open category as per Rule 5.6 of the prospectus. It is further submitted by the learned A.G.P. that as per Regulation 5.5 reserved category candidate is first offered admission in open category on the basis of his marks obtained. In the First round held from 1-11-2003 2003 female candidates of ST category till merit number 360 were called for interview. On 5-11-2003 the candidates at Sr. No.347 having 74.67% in H.S.C. and 64.29% in S.S.C. filled up the last seat of female for ST category. Thereafter two seats in the ST category for female fell vacant and therefore the candidates at merit nos. 348 and 349 having 74.69 marks in HSC and 64.14% marks in SSC were given admission. In view of the above mentioned circumstances, there was variation in the marks in the first and second round of interviews. Therefore, last seat for female category in ST class was filled up by candidate on 6-12-03 at Sr. No.349 having 74.67% marks in HSC and 64.14% marks in SSC.

10.4 After pointing out the aforesaid facts, learned A.G.P. has submitted that as per seats of Government quota in self-finance institution had fallen vacant as well as Association of SFI colleges had requested the Government to fill up the management quota seats through Centralized Admission Committee it became necessary to issue an advertisement for third round. The candidates from open category as well as the candidates of reserved category who did not fall in the zone of consideration in open category in earlier two rounds are called for interview for seeking admission in open category. The learned A.G.P. for the respondent State submitted that in the third round as the reserved category candidates were competing for the open category seats in the advertisement no bifurcation is made for the reserved category and the marks required are also higher. The learned A.G.P. submitted that as the last admission for female in ST category has stopped at merit number 349 having 74.67% marks in HSC and 64.14% marks in SSC the

petitioner cannot be given admission in the said category as the petitioner stands at merit no. 445 and she has obtained 74.33% in HSC and 67.29% in SSC. In view of the aforesaid facts and circumstances of the case, the petitioner is not entitled to get admission in PTC course and hence the present petition requires to be rejected.

10.5 Learned A.G.P. further submitted that in the third round for reserved category for ST candidates, ST candidates bearing merit No.ST 34 to 43 & merit No.44 to 46 were called for admission on 12-12-2003, 13-12-2003 and 14-12-2003 respectively as these candidates have already taken admission in first and second round. In their own category and now they have been eligible for admission in open category and therefore the merit percentage 76.83 (77.43) for 13-12-2003 and 76.83% (73.71%) for 14-12-2003 are shown in the advertisement.

11. The petitioner has filed rejoinder affidavit denying the averments and contentions made by the respondents in the affidavit-in-reply. The petitioner has also stated in this rejoinder affidavit that the seats of management quota i.e. 50% of the total seats of non-aided private colleges are also required to be filled in after keeping the reservation of 7% for Scheduled Caste, 15% for Scheduled Tribe and 27% for SEBC candidates. The respondents have not filled in the seats of management quota by keeping reservation for reserved category candidates and thus the respondents have committed illegality. The action of the respondents in not keeping any seats reserved for SC, ST and SEBC categories in the management quota seats in Government recognized self-finance college is against the constitutional mandate enshrined in Article 15 of the Constitution of India.

11.1 The learned counsel for the petitioner has also relied upon judgment of Hon'ble Apex Court in the case of Dr.Preeti Srivastava and another Vs. State of Madhya Pradesh and others reported in AIR 1999 SC 2894. In para 12 and 13 on page 2903 and 2904 the Hon'ble Apex Court observed as under:

11.1A "para 12 Article 15(4), which was added by the Constitution, First Amendment of 1951, enables the State to make special provisions for the advancement, inter alia, of Scheduled Castes and Scheduled Tribes, notwithstanding Articles 15(1) and 29(2). The wording of Article 15(4) is similar to that of Article 15(3). Article 15(3) was there from inception. It enables special

provisions being made for women and children notwithstanding Article 15(1) which imposes the mandate of non-discrimination on the ground (among others) of sex. This was envisaged as a method of protective discrimination. This same protective discrimination was extended by Article 15(4) to (among others) Scheduled Castes and Scheduled Tribes. As a result of the combined operation of these Articles, an array of programmes of compensatory or protective discrimination have been pursued by the various States and the Union Government."

11.1B "para.13 Since every such policy makes a departure from the equality norm, though in a permissible manner, for the benefit of the backward, it has to be designed and worked in a manner conducive to the ultimate building up of an egalitarian non-discrimination society. That is its final constitutional justification. Therefore, programmes and policies of compensatory discrimination under Article 15(4) have to be designed and pursued to achieve this ultimate national interest. At the same time, the programmes and policies cannot be unreasonable or arbitrary, nor can they be executed in a manner which undermines other vital public interests or the general good of all."

11.2 The learned counsel relied upon the decision of the Supreme Court in the case of NTR University of Health Sciences, Vijaywada V. G. Babu Rajendra Prasad and Another, reported in 2003 (5) SCC 350, wherein it is observed as under :

11.2.A "13 : Articles 15 and 16 of the Constitution of India provide for enabling provisions. By reason thereof the State would be entitled to either adopt a policy decision or make laws providing for reservation. How and in what manner the reservations should be made is a matter of policy decision of the State. Such a policy decision normally would not be open to challenge subject to its passing the test of reasonableness as also the respondents of the Presidential Order made in terms of Articles 371-D of the Constitution of India."

11.2(B) "para 14 on page 360 :- It is not in dispute that

limited seats are available for admission in the superspeciality courses. It may be true that normally the reservation has to be made for the entire State but in terms of Article 371-D of the Constitution of India reservation has to be made regionwise. The seats have been reserved indisputably on total available seats in each discipline and those who come within the zone of consideration are considered for admission from amongst the reserve category candidates. Once it is found that reservation has been made for the reserved-category candidates on the total number of seats available in each course, the High Court must be held to have committed a manifest effort in issuing the impugned direction."

11.2(C) The learned counsel relied upon the decision of the Hon'ble Supreme Court in the case of Islamic Academy of Education and Another Vs. State of Karnataka and others reported in 2003 (6) SCC 697. The said judgment of the Hon'ble Supreme Court has been delivered by the Hon'ble Chief Justice of India himself and S.V. Variava, K.G. Balakrishnan, Arjit Pasayat and S.B. Sinha, JJ and the same is to be called as majority judgment. In para 21 at page 730 of the above Judgment in the case of Islamic Academic of Education (supra), the Hon'ble Supreme Court has observed as under:

11.2(D) "Para 21 - So far as the year 2003-2004 is concerned, time is running out as the outer time-limit for admission is fast approaching or has gone. To meet the urgent situation without going into the issues involved in the various petitions/applications, we direct that the seats be filled up by the institution and the State Governments in the ratio 50:50. However, if by any interim order, this Court has permitted any institution to fill up a higher percentage of seats and the seats have been filled up accordingly, the same shall not be disturbed. It is made clear that due to the time constraint this arrangement has been made, without deciding the contentious issue involved in various pending cases."

11.2(E) Thereafter, in concurring judgment of the Hon'ble Mr. Justice S.B. Sinha, has considered the submissions made on behalf of the petitioners/applicants in para 36 of the said judgment of Islamic Academic of Education more particularly on page 734 at para 36 (II) (iii) In the case of unaided institutions. In this very judgment

of Islamic Academic of Education, at page 749 in para 70 (b) as under :

11.2(F) "70 - With a view to appreciate the extent to which the scheme formulated in Unni Krishnan was not found favour with T.M.A. Pai Foundation we may set out the observations of this Court in T.M.A. Pai Fecundation as follows :

11.2(G) 70 (b) - Certain percentage of seats can be reserved for admission by management out of those students who have passed the common entrance test held by itself or by the State agency and the rest of the seats may be filled up on the basis of counselling by the State Agency. Prescription by percentage has to be determined by the Government according to local needs.

11.2(H) "3. Reservation of seats : While the State has a right to prescribe qualifications necessary for admission, private unaided colleges have right to admit students of their choice subject to objective and rational procedure of selection and the compliance with the conditions, if any, requiring admission of certain percentage of students belonging to weaker sections by granting them free scholarships or scholarships if not granted by the Government.

11.2(I) As regards reservation in connection with Article 15 of the Constitution of India, the learned Judge has considered this question in paragraphs no. 118, 129, 131, 146, which read as under :

11.2(J) "para 118 - Human history would show that the struggle of man for democratic polity was inspired by a desire to achieve equality among them. Indeed, some of the world constitutions in their preamble abhor inequality and proclaim to achieve equality in all respects. Whatever may be the power and the jurisdiction of the State and the State authorities to make a special provision in favour of the backward and the downtrodden, when the court tests the reasonableness of such distinctive State action, it should be done by posing a question whether such State action to ameliorate social economic and political poverty; whatever be the reason, delays the journey towards the proclaimed goal of equality. If a measure tends to perpetuate

inequality and makes the goal of equality a mirage, such measure should not receive the approval of the Court. The Court, in such circumstances, has to mould the relief by indicating what would be the reasonable measure or action which furthers the object of achieving equality. The concept of equality is not a doctrinaire approach. It is a binding thread which runs through the entire constitutional text. An affirmative action may, therefore, be constitutionally valid by reason of Articles 15 (4) and 16 (4) and various directive principles of State policy, but the Court cannot ignore the constitutional morality which embraces in itself the doctrine of equality. It would be constitutionally immoral to perpetuate inequality among majority people of the country in the guise of protecting the constitutional rights of minorities and constitutional rights of the backward and downtrodden. All the rights of these groups are part of the right to social development which cannot render national interest and public interest subservient to right of an individual or right of a community."

11.2(K) "129 - The said provisions were inserted by the Constitution First Amendment, 1951. there, thus, exists provisions for an exception to Article 14 and 15 as also clause (2) of Article 29 of the Constitution of India. The State has also a right to make some reservation for women and children in terms of clause (3) of Article 15 of the Constitution of India. Clauses (3) and (4) of Article 15 provide an exception to the general rule. A special provision either for women and children in terms of clause (3) or for advancement of social and backward class of citizens or Scheduled Castes and Scheduled Tribes in terms of clause (4) must be made by the State in terms of a legislation or an executive order. Such a legislation or executive order would be in relation to the State action. The said provisions cannot be extended by way of imposition of restriction or regulation so as to impair the right of a citizen of India under Article 19 (1) (g) or Article 30 thereof. The question which may arise is as to whether the State can mandate upon an industry or a business house (for example) to provide job to a person belonging to a reserve category. If not, the necessary corollary would be that such a

restriction or regulation cannot be imposed on a citizen carrying on an "occupation". The right of a citizen in terms of Article 19 (1) (g) of the Constitution whether "to practice any profession" or "to carry on any business/occupation" must be the same or similar. The reasonable restrictions sub-clause (6) must be on the exercise of a right conferred by the said sub-clause. Although reasonable restrictions can be imposed on exercise of such right in terms of the constitutional scheme, the State cannot impose its own duties and obligations upon the citizen.

11.2(L) "131 - At this juncture, it may be useful to refer to the decisions of this Court in Kerala Education Bill, 1957, wherein S.R.Das, J speaking for the Constitution Bench held in the following terms: (AIR pp.985-86, paragraph 34).

11.2(M) "(34 of Kerala Education Bill 1957 judgment). Learned counsel for the State of Kerala referred us to the directive principles contained in Article 45 which requires the State to endeavour to provide, within a period of ten years from the commencement of the Constitution, for free and compulsory education for all children until they complete the age of fourteen years and with considerable warmth of feeling and indignation maintained that no minorities should be permitted to stand in the way of the implementation of the sacred duty cast upon the State of giving free and compulsory primary education to the children of the country so as to bring them up properly and to make them fit for discharging the duties and responsibilities of good citizens. To pamper to the selfish claims of these minorities is, according to learned counsel, to set back the hands of the clock of progress. Should these minorities, asks learned counsel, be permitted to perpetuate the sectarian fragmentation of the people and to keep them perpetually segregated in separate and isolated cultural enclaves and thereby retard the unity of the nation ? Learned counsel for the minority institutions were equally eloquent as to the sacred obligation of the State towards the minority communities. It is not for this Court to question the wisdom of the supreme law of the land. We the people of India have given unto ourselves the Constitution which is not for any particular community or

section but for all. Its provisions are intended to protect all, minority as well as the majority communities. There can be no manner of doubt that our Constitution has guaranteed certain cherished rights of the minorities concerning their language, culture and religion. The concessions must have been made to them for good and valid reasons. Article 45, no doubt, requires the State to provide for free and compulsory education for all children, but there is nothing to prevent the State from discharging that solemn obligation through Government and aided schools and Article 45 does not require that obligation to be discharged at the expense of the minority communities. So long as the Constitution stands as it is and is not altered, it is, we conceive, the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own. Throughout the ages endless inundations of men of diverse creeds, cultures and races - Aryans and non-Aryans, Dravidians and Chinese, Scytheans, Huns, Pathans and Mughals have come to this ancient land from distant regions and climes. India has welcomed them all. They have met and gathered, given and taken and got mingled, merged and lost in one body. India's tradition has thus been epitomised in the following noble lines.

'None shall be turned away
From the shore of this vast sea
of humanity
That is India (Poems by Rabindranath Tagore

Indeed India has sent out to the world the message of goodwill enshrined and proclaimed in our national anthem :

'Day and night, thy voice goes out from
land to land,
calling Hindus, Buddhists, Sikhs and Jains,
round thy throne
and Parsees, Mussalmans and Christians,
Offerings are brought to thy
shrine by
the East and West
to be woven in a garland of
love.
Thou bringest the hearts of all
people

into the harmony of one life,
Thou Dispenser of India's
destiny,
Victory, Victory, Victory to
thee.
(Rabindranath Tagore)

11.2(N) It is thus that the geninus of India has been able to find unity in diversity by assimilating the best of all creeds and cultures. Our Constitution accordingly recognizes our sacred obligations to the minorities. Looking at the rights guaranteed to the minorities by our Constitution from the angle of vision indicated above, we are of opinion that clause 7 (except sub-clause 1 and 3 which apply only to aided schools) and clause (1) may well be regarded as permissible regulation which the State is entitled to impose as a condition for according its recognition to any educational institution but that clause 20 which has been extended by clause 3 (5) to newly established recognized schools, insofar as it affects educational institutions established and administered by minority communities is violative of Article 30 (1).

11.2(O) "146 - The judgment of this Court in T.M.A. Pai Foundation will, therefore, have to be construed or to be interpreted on the aforementioned principles. The Court cannot read some sentences from here and there to find out the intent and purport of the decision by not only considering what has been said therein but the text and context in which it was said. For the said purpose the Court may also consider the constitutional or relevant statutory provisions vis-a-vis its earlier decision on which reliance has been placed."

12. Learned advocate for the petitioner has also relied on the decision of the Supreme Court in the case of Saurabh Chaudri and Others Vs. Union of India and Others, reported in 2003 AIR SCW 6392, wherein it is held as under :

12.1 "105 (on page 6427) - In the case of Article 15 (4) reservations, this Court has made it clear that the claims of nationals interest demands that these reservations can never exceed 50% of the available seats in the concerned educational institutions."

12.2 "106 - The view was approved by this Court in the case of Indra Sawhney V. Union of India. If one looks at this issue in the light of the spirit of the ratio laid down in Preeti Srivastava V. State of M.P. AIR 1999 SC 2894 and in AIIMS Students' Union V. A.I.I.M.s, AIR 2001 SC 3262, one would come to the inevitable conclusions that the constitutional reservations contemplated under Article 15 (4) should be kept at the minimum level so that national interest in the achievement of the goal of excellence in all fields is not unduly affected."

12.3 "108 (page 6427) - As regards the constitutional validity of institutional/regional/University wise reservation/preference, in view of this Court's emphasis on the need to strive for excellence which alone is in the national interest, it may not be possible to sustain its constitutional validity. However, the presently available decisional law is in support of institutional preference to the extent of 50% of the total available seats in the concerned educational institutions."

12.4 "Page 6428 of 2003 AIR SCW p. 108(3)(7) - As regards the scope of reservation of seats in educational institutions affiliated and recognised by State Universities, the constitutional prescription of reservation of 50% of the available seats has to be respected and enforced.

12.5 As regards the unaided institutions, they have large measure of autonomy even in the matters of admission of students as they are not bound by the constraints of the demands of Art. 29 (2). Nor are they bound by the constraints of the obligatory requirements of Constitutional reservation."

12.6 The learned counsel for the petitioner has relied upon another judgment of the Hon'ble Supreme Court in the case of Ashutosh Gupta Vs. State of Rajasthan and others reported in (2002) 4 SCC 34 particularly para 4 on page 40 the Hon'ble Supreme Court observed as under:

"para.4 In the Constitution itself, even while providing in Article 46 that the State shall promote special care for the educational and economic interest of the weaker section of the people and in particular of the Scheduled Castes and Scheduled Tribes and Article 16(4) of the

> Constitution having further provided that the mandate of Article 16(a) requiring equality of opportunity for all citizens in matters relating to employment or appointment to any office in the State does not prevent the State from making any provision for the reservation of appointments to posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services of the State. Article 335 stipulates that the claims of the members of Scheduled Caste and Scheduled Tribes shall be taken into consideration, consistent with the maintenance of efficiency of administration, in the making of appointment to services and posts in connection with the affairs of the Union or of the State. It is, thus, apparent that even in the manner of reservation in favour of Scheduled Castes and Scheduled Tribes the founding fathers of the Constitution did make a provision relating to the maintenance of efficiency of administration."

13. I have gone through the unreported judgment of the Division Bench(Coram : R.C. Mankad and R.A. Mehta, JJ) of this Court delivered on 29-8-1989 in Special Civil Application No. 6691 of 1987 and other group of matters. In this case, the petitioners have challenged the Government Resolution by which it was decided that where members belonging to the Scheduled Caste and Scheduled Tribes are selected for appointment by direction selection to any service or post included in the State Service or the Subordinate Service and Panchayat Services on the basis of merit, then such members shall be considered for appointment on unserved posts which are filled in on merits, along with other candidates not belonging to such castes and tribes and such appointment on merit of the members belonging to such castes and tribes shall not, in any, affect the claims of the members of such castes and tribes for appointment in service or, on the posts reserved for them under the Government orders issued from time to time and whether this decision of the Government violates Articles 14 and 16 (1) of the Constitution of India.

13.1 I have also gone through the judgment of this Court delivered on 10, 16, 17, 19 and 23-4-2003 in Special Civil Application No. 9379 of 1999 with other group of matters. However, considering the facts of the present case and the facts of the said decision, this

Judgement of this Court does not help to the case of the present petitioner.

MY CONCLUSION:

13.2 I have considered the provisions of Article 15 of the Constitution of India. I have also considered the judgment of the Hon'ble Supreme Court in the case of Islamic Academic of Education (supra) more particularly para 21 and NTR University (supra). I have also considered the submissions made by Mr. Y.N. Oza, Sr. Advocate appearing for Mr. B.P. Gupta for the petitioner and Ms. Mita Panchal, learned A.G.P. for the respondents, the affidavit-in-reply filed by the respondent no. 1, rejoinder affidavit filed by the petitioner.

13.3 "(9.161) Article 15, as originally enacted, contained only three sub-clauses. Sub-clause (4) was inserted by the Constitution (1st Amendment) Act, 1951, as a result of the decision in Madras V. Champakam Dorrairajan. In that case, the Sup. Ct. struck down the "Communal G.O." as violating Art.15 or Art. 29(2). Das J. observed:

"Seeing, however, that clause(4) was inserted in Article 16, the omission of such an express provision from article 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds."

"The object of (the 1st.) Amendment was to bring Arts. 15 and 29 in line with Art. 16(4)." However, Art.16(4) refers to "backward class of citizens", whereas Art.15(4) refers to "socially and educationally backward class of citizens or for Sch. Castes and Sch. Tribes." The difference between Art. 15(4) and Art. 16(4) is striking, but, as will appear hereafter, the words "backward classes" have been judicially interpreted as covering the same classes as are referred to in Art. 15(4)."

{Re: Commentary of H.M.Seervai, learned Author on Constitution of India, Fourth Edition, Volume I para 9.161 page 551}

13.4 "(9.170) Having noticed the nature and scope of sub-Arts. 15(1) and (2), vis-a-vis sub-Arts. 15(3) and (4), we can now ascertain the inter-relation of Art.15(1) and Art.15(4). If Art.15(1) stood alone, no discrimination could be made, for example, in favour of Sch. Castes, first, because discrimination on the ground of caste is prohibited by Art.15(1), and Sch.Castes are castes. In any event, discrimination on the ground of religion is also prohibited by Art.15(1) and Sch. Castes are based on religion, because no one can be deemed to be a member of the Sch. Castes if he does not profess the Hindu or the Sikh religion. Therefore Art.15(4) takes out discrimination in favour of Sch. Castes from the prohibition against discrimination on the ground of caste or religion. But in a Section or in an Article, a later provision which takes something out of an earlier provision, is recognised to be an exception because, but for the exception, its subject matter would fall within the earlier provision. Secondly, this subordination of sub-Art. 15(4) to Art.15(1) is further strengthened by the fact that sub-Art.15(1) confers a legally enforceable fundamental right and sub-Art.15(4) confers no right at all, and a sub-Article conferring a fundamental right is on a higher plane than a sub-Article conferring no right, but merely conferring a discretionary power on the State."

{Re: Commentary of H.M.Seervai, Fourth Edition, Volume I para 9.170 page 557}

13.5 "On the whole, the impact of judicial pronouncements in the area has been whole-some. The growing tendency to make reservations in technical institutions for all and sundry has been curbed to some extent. In the absence of Judicial control, reservation would have run riot, excluding all merit. Had this tendency not been controlled, it would have led to the inevitable result of falling standard which would have been a national loss. Many deserving and better qualified candidates from the so called advanced sections of society would have been forced to go without education and this would have been unjust to them. The Supreme Court's pronouncements put the whole problem posed by Art.15(4) within a reasonable mould. It was also

necessary to play down the importance of caste lest the caste system instead of being obliterated should be perpetuated."

{Re: Commentary on M.P.Jain on Constitutional Law, Fifth Edition on page 1080}

13.6 Article 335 of the Constitution of India which provides as follows:

"Art.335 Claims of Scheduled Castes and Scheduled Tribes to services and posts:- The claims of the members of the Scheduled Castes and Scheduled Tribes shall be taken into consideration, consistently with the maintenance of efficiency of administration, in the making of appointments to services and posts in connection with the affairs of the Union or of a State."

13.7 The learned Author Mr.M.P.Jain on Constitution of India on page 1645 after referring to Article 335 has observed like this:

"The general principle adopted as regards government service is merit, but in case of the Scheduled Castes and the Scheduled Tribes, some relaxation is needed because of their backwardness. Art.335, therefore, provides that the claims of the members of the Scheduled Castes and Scheduled Tribes are to be taken into consideration, consistently with the maintenance of efficiency of administration, in making appointments to services and posts in connection with the affairs of the Union or of a State. This provision thus imposes a constitutional obligation on the various governments to take steps to ensure that the claims of members of the Scheduled Castes and Scheduled Tribes are duly considered in making appointments to government service."

13.8 "The central idea of my scheme, the details of which would have to be worked out, is to adopt measures which would put SC and ST children as near to children more favourably placed as circumstances permit. One of the most serious handicaps of SC and ST children is that their parents are obliged to increase the family income by making even very small children earn a small income by part time work, e.g. by selling newspapers. The time so taken up is withdrawn

from studies and other activities of the school; a handicap from which children more fortunately placed are free. The compensatory measures to remove this handicap are: free education, free supply of text books and other school requisites; free supply of uniforms where prescribed. But to remove the temptation of SC and ST parents to make their children earn by part time work, it is necessary to provide a daily stipend or grant for each SC and ST child which would leave him free to do school work and participate in other activities which are a part of education in schools. We must begin with the primary school, for the object of the scheme is not only to put SC and ST children on a level with others but to give them an opportunity of showing their talents and abilities."

(Re: H.M. Seervai, Fourth Edition, Volume 1 para 9.291 on page 619}

13.9 "Dr.B.R.Ambedkar was luckily the Chairman of the Drafting Committee of free India's republican Constitution. He ensured that caste would be anathema to our noble Constitution and strove single-mindedly to bring about the social integration of India. In Dr.Ambedkar's own words, "Fraternity means a sense of common brotherhood of all Indians - of Indians being one people .... Castes are anti-national: in the first place they bring about separation in social life. They are anti-national also because they generate jealousy and antipathy between caste and caste. But we must overcome all these difficulties if we wish to become a nation in reality. For fraternity can be a fact only when there is a nation. Without fraternity, equality and liberty will be no deeper than coats of paint."

(Re: "We, the Nation" by Shri Nani A.Palkhivala on the subject "Supreme Court's Judgment in the Mandal Case" on page 178}

13.10 " All appointments to any of the three wings of the Constitution is a continuous process. If Indra Sawhney (supra) would have held that the then existing provisions in the Constitution included promotional posts also where reservation was to be applied, Parliament would not have hastened to amend and bring about Articles 16 (4-A) and 16 (4-B) through the 77th Amendment

Act, 1995 and 81st Amendment Act of 2000. In short, the result now is simple. While reservation policy will apply in selecting IAS, IFS and ICS Officers, the competition for which cadres perhaps attracts the best brains from the upcoming generation, it will not apply for ICS (J) or HJS Officers, who would be manning the respective posts in the judiciary. The responsibilities and obligations of the Judicial Officers as well as the Executive Officers towards the society and the nation are not much different. To repeat, the reservation policy as it is, aims to bring about social justice and may be continued only till social status of the downtrodden is not made to equal the others in the society."

{Re: Justice Pollock Basu in the book "Law relating to protection of Human Rights under the Indian Constitution and Allied Laws" in Chapter 4 the learned Author has observed "Human Rights and Reservations for Backward Classes, page 123}

14. It may be noted that the present petition was filed on 10-12-2003 and the admission process for P.T.C. course carried out by the respondents was already over prior to that. From reasons mentioned in the aforesaid affidavit-in-reply filed by the respondent no.1 and also from the aforesaid charts showing allotment of seats of the PTC courses. Only in Government and Government aided colleges as well as non-aided private colleges where there is 50% Government quota. However, the Government is of the view that the Government has no right to have reservation in non-aided private colleges in view of Article 15 of the Constitution of India and the aforesaid judgments of the Supreme Court of India which have been considered by me, the only limitation is that the Government can have reservation for 50%. But the Government cannot have more than 50% reservation. From the judgment of the Hon'ble Supreme Court in the cases of Islamic Academic of Education and NTR University (Supra). From the above legal position, it is clear that the State has right to prescribe the qualifications necessary for admission. The private unaided college have right to admit the students of their choice subject to objective and rational procedure of selection and the compliance with the conditions, if any, requiring admission of certain percentage of students belonging to weaker sections by granting them free scholarships or scholarships if not granted by the Government.

15. From the aforesaid observations made in the judgment of the Hon'ble Supreme Court in the case of Islamic Academic of Education (supra) it crystal clear that the only requirement is that the Government can have only 50% reservation with compliance with the conditions, to non-aided private colleges.

15.1 I have considered Article 15(4) of the Constitution of India, the affidavit of the Government of India they have stated that as regards non-aided private colleges is concerned, the same is divided into 50% Government quota and 50% Management quota. The Government has power to have a reservation under Article 15(4) of the Constitution of India only pertaining to 50% Government quota. The Government has no power to keep reservation in non-aided private colleges particularly where 50% management quota is concerned. The Government has filed detailed affidavit and stated all these aspects which I have considered earlier while referring to the Government affidavit. I have also considered the judgment of the Hon'ble Apex Court in the case of Dr.Preeti Srivastava (supra), judgment of NTR University of Health Sciences, Vijaywada (supra), judgment of Islamic Academy (supra), judgment of Hon'ble Supreme Court in case of Ashutosh Gupta (supra) and Saurabh Chaudri and others (supra) and also judgment of this Court, commentary of Mr.Seervai on Constitutional Law, commentary of Mr.Jain on Constitutional Law, commentary of Mr.Basu and Article of Mr.Nani Palkhivala. After considering all these aspects, it will not be possible to accept the contention of the learned advocate for the petitioner that Government has power to direct non-aided private colleges particularly in their 50% management quota to keep 15% reservation as per Article 15(4) of the Constitution of India. The same is contrary to the basic scheme of Article 15 of the Constitution of India. I have also considered Article 335 of the Constitution of India and the commentary of learned authors in this behalf. If the arguments of the learned advocate for the petitioner is to be accepted, the same is contrary to Article 335 of the Constitution of India and other judgments of the Hon'ble Apex Court. All these judgments of the Hon'ble Apex Court only point out that there can be reservation as regards Government quota is concerned and no judgments of the Hon'ble Supreme Court provides that Government has power to provide reservation in non-aided private colleges particularly 50% management quota in this behalf. Therefore it will not be possible for this Court to accept the contention of the learned advocate for the petitioner from the aforesaid judgments of the Hon'ble Supreme Court in the case of Islamic

Academic of Education and NTR University.

15.2 In view of this aforesaid discussion, in my view when the Government has decided to grant reservation in Government Aided Colleges and also in Non-aided private colleges where 50% quota is from the Government, the same is correct and legal. In my view the decision of the Government that Government cannot provide any quota for reservation under Article 15(4) of the Constitution of India in non-aided private colleges where 50% management quota is there is perfectly legal and valid. I have considered as stated above Article 15(4) of the Constitution of India and other authorities which I have mentioned in para 15.1 in this behalf. It may be noted that due to paucity of time this year it will be impossible for this Court to direct the Government to give reservation, however for future also I am of the view that the decision of the Government is right and Government cannot compelled to have reservation for Scheduled Caste and Scheduled Tribe in non-aided private colleges particularly where the management has 50% quota. For arriving at this decision, I have considered Article 355 of the Constitution of India as well as Commentaries of Mr.H.M.Seervai, Mr.M.P.Jain, Mr.Basu and various judgments of the Hon'ble Supreme Court including Islamic Academy (supra) and Saurabh Chaudhari (supra) which clearly shows that Article 15(4) of the Constitution of India does not confer any right on the citizen, and therefore it will not be possible for this Court to direct the Government to keep reservation in this behalf.

16. In view of the above discussion and in view of the judgments of the Hon'ble Supreme Court referred to hereinabove more particularly in the case of NTR University, this Court cannot issue a writ of mandamus to the respondents and therefore this petition is dismissed. Rule is discharged with the no orders as to costs.

(K.M. Mehta, J.)

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